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Supreme Court of the United States

OCTOBER TERM, 1925

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No. 163

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

UPON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

REPLY BRIEF OF COUNSEL FOR PETITIONER

INDEX

PAGE

Table of Cases 2

Argument 3

243944

TABLE OF CASES

	PAGE
Baggott vs. S. Ry. Co. 300 Fed. 377	10
Brown vs. St. Louis & San Francisco Ry. Co. 268 S. W. 679	9
L. & N. R. R. Co. vs. Tuttle, 258 S. W. 688	9
McPhearson County vs. Director General, 203 Pac. 912	9
Morris Avenue Bridge, 174 N. Y. S. 682	10
Union Pac. Ry. Co. vs. Campbell, 238 Fed. 708	8

TEXT BOOKS

20 R. C. L. Nuisances, Sec. 14, p. 392	7
20 R. C. L. Nuisances, Sec. 16, p. 392	7

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REPLY BRIEF OF COUNSEL FOR PETITIONER

In the brief of counsel for Respondent it is said that the statement of facts by counsel for Petitioner is incomplete, and in the opinion of counsel is incorrect and misleading. The controlling facts of the case are that in July, 1904, Respondent conveyed to the Deepwater Railway Company certain land to be used for railroad right of way. The Deepwater Railway Company proceeded to construct its roadbed on this and adjacent land. Respondent lived on the tract of land, a part of which had been conveyed to the railway company for right of way and as stated by him there was never a day while the railroad was being constructed that he did not observe the work being done. (R. pp.

28-29.) The railroad embankment constructed on or adjacent to Respondent's land was partly located in the channel of the stream. This resulted in changing to some extent the channel in the stream as was expressly provided for in the conveyance from Respondent. (R. p. 77.) No protest or objection was made by Respondent to the location or method of construction of the railroad roadbed.

In April, 1907, after the completion of the construction of the railroad the Deepwater Railway Company conveyed its line of railroad in West Virginia to Petitioner. Petitioner took possession of said railroad and operated same without change in the roadbed at the point in question until December 31, 1918, when the railroad was taken over by the United States Government. (R. p. 69.) The Government operated the railroad until March 1, 1920. Up to the time the Government took over the railroad no appreciable damage had been done to the Respondent's land, the first appreciable damage resulting from an ice freshet in February, 1918. (R. pp. 15, 29, 30.)

In July, 1919, there occurred an unusual freshet which caused the principal damage done to Respondent's land. The first protest or objection made by Respondent to Petitioner on account of the alleged nuisance caused by partly filling the channel of the stream was by letter dated April 4, 1920. (R. pp. 24, 71.) This letter shows that Respondent did not then know whether or not Petitioner had previous knowledge of the alleged nuisance and Respondent was not then asking to be compensated in damages.

In such cases as the one at bar the foundation of the cause of action is that a nuisance is created by obstructing the channel of a stream so as to change its current.

The cause of action in such cases does not arise out of contract and this is recognized by Respondent as his declaration is in tort. (R. p. 4.)

When the channel of a stream has been changed and results in washing the lands of an adjoining owner in periods of high water the damages resulting are treated as intermittent or temporary as distinguished from permanent damages and a new cause of action arises when each flood occurs from which damages result. Respondent, therefore, can only base a recovery in this case on a cause of action founded in tort and for damages actually accrueing during Federal Control. In Respondent's brief the liability of Petitioner is sought to be placed on two grounds, namely:

1. That Petitioner under the obligation of an express contract is subject to liability for the damages resulting from the alleged nuisance.

2. That independent of contract, Petitioner is liable for damages accrueing during Federal Control, on the ground that Petitioner had notice of the alleged nuisance prior to Federal Control, and was under a duty to abate or remove it.

The theory of Petitioner's contract liability is that the deed from Respondent to Petitioner conveying land for rights of way conveys such additional land as may be necessary for the slopes of cuts and fills and for changing the channels of streams, such additional land to be taken and so used as not to unnecessarily damage the residue of Respondent's land, and that the deed from the Deepwater Railway Company to Petitioner contains a provision under which the Petitioner assumes all lawful debts, liabilities, contracts and other obligations of the Deepwater Railway Company. From the provisions of the deed first above referred to

it is sought to interpret an express contract on the part of the grantee to construct a new channel for the stream and to use the additional land conveyed for that purpose. The language of the deed in question does not admit of such a construction. It might as well be argued that this language admits of the construction that the grantee could change the channel of the stream by constructing its roadbed partly therein as was done and should not be liable for any damages that necessarily result from that method of construction.

The ground of liability, if any, in this case under the law and under the allegations of Respondent's declaration is founded in tort and is for the maintenance of a nuisance or the failure to abate a nuisance. This liability arose when the floods occurred in February, 1918, and July, 1919.

The language of the second deed above referred to under which Petitioner assumes all debts, liabilities, contracts and other obligations of the Deepwater Railway Company, could not be construed as the assumption of a liability founded in tort which did not then exist and which came into existence many years after the execution of the deed, nor can this language properly be construed to impose upon Petitioner liability for a nuisance, which under the law is imposed upon the original creator of the nuisance. In relation to the alleged nuisance Petitioner stands in the same position of any other grantee who accepts a conveyance of land on which a nuisance has been created. The law as to the liability for an alleged nuisance in such cases is well settled and is stated as follows:

> "The liability for a nuisance springs from the wrongful act of creating or continuing it,

rather than from owning or occupying the premises. If the owner or the occupier of property creates a nuisance thereon, he is liable not because he owns or occupies the premises, but because he created the nuisance. And if the owner or occupier of property continues a nuisance created thereon by others, he is liable, not because he owns or occupies the premises, but because he does not abate the nuisance."

20 R. C. L., Nuisances, Sec. 14, p. 392.

The theory of Petitioner's liability on account of maintaining the nuisance and for failure to abate it is founded on the contention that Petitioner had notice of the nuisance and knowledge of its harmful effects on Respondent's lands. The law as to the liability of a purchaser of land for damages for a nuisance in existence at the time of the purchase is stated as follows:

"It is well settled that the purchaser of land on which a nuisance established by his grantor exists is not liable for merely permitting it to remain or for continuing it, in the absence of a prior notice or request for its removal by the person injured. And so it is held that one who inherits property is not liable for a nuisance created thereon during the existence of the precedent estate. But the doctrine is also recognized that a person who continues a nuisance is liable without a request to remove it if the nuisance results from a continuance by affirmative acts rather than from an omission to take active measure to abate it."

20 R. C. L., Nuisances, Sec. 16, p. 392.

For notice to or knowledge of Petitioner of the

existence of the nuisance, Respondent relies on the testimony of Lovern, Respondent's section foreman (R. p. 56) and Traugott, Respondent's assistant chief engineer. (R. p. 69.) The witness Lovern testifies that a stonemason contractor was removing rocks from the side of the railroad fill and that he prohibited him from doing so. The witness, Traugott testifies that the railroad roadbed located opposite the Mullens land has remained in practically the same condition from the time it was built until the flood fo July 15, 1919. No notice to or knowledge of the alleged nuisance to Petitioner can be inferred from this evidence. Especially is this true when Respondent acquiesced in the construction of the alleged nuisance and in its maintenance without protest or objection until April 4, 1920, as above shown. Petitioner, for aught this evidence shows, may have been ignorant of the harmful effects of the alleged nuisance or may have reasonably presumed that the alleged nuisance was voluntarily submitted to by Respondent, and under such circumstances there could be no recovery for the alleged injury.

Union Pac. Ry. Co. v. Campbell, 236 Fed. 708.

The cases cited by Respondent on the question of Petitioner's liability for damages during Federal Control are not in conflict with the principles on which Petitioner relies.

The case of Cumberland Telegraph & Telephone Company vs. Lawrence, 271 Fed. 89, arose out of an accident which occurred during Federal Control. The accident was caused by a guy wire installed in a street by a telephone company long prior to Federal

Control and liability was placed on the ground that the telephone company was the creator of the nuisance which existed by reason of locating and maintaining the guy wire in the street.

The case of Hines vs. Woodson, 280 Fed. 966, involved a claim for damages which arose out of the obstruction of a stream by a bridge built by the railroad company many years before Federal Control. The Director General of Railroads was alone sued and it was held that there was no liability without previous notice to the Director General for the obstruction of a stream by his predecessor in title. The question of the liability of the railroad company was not involved.

The case of Brown vs. St. Louis & San Francisco Railroad Company, 268 S. W. 679, was a suit against the railroad company for damages accrueing during Federal Control resulting from the obstruction of a stream by a bridge constructed by the railroad company prior to Federal Control. The liability of the railroad company was placed on the ground that it was the creator of the nuisance and hence this case is not in point on the question here involved.

The case of L. & N. Ry. Co. vs. Tuttle, 258 S. W. 688, arose out of the failure of the railroad company to construct approaches to grade crossings pursuant to its contract with the landowner entered into prior to Federal Control. The liability of the railroad company for the damages resulting to the landowner was predicated upon a breach of its contract and the court held that the railroad company had ample time in which to comply with its contract prior to Federal Control.

The case of McPhearson County vs. Director General of Railroads, et al, 203 Pac. 912, was a joint action against the Railroad Administration and the Railroad

Company to recover the cost of the construction of a bridge which had been washed away by a flood during Federal Control. The bridge in question formed a part of an approach to a road crossing over the railroad tracks. The liability of the railroad company was placed on the ground that it was its duty under the law to maintain the crossing, including the approaches of which the bridge was an essential part and therefore the railroad company was liable for the cost of rebuilding the bridge. The liability in this case arose out of a duty imposed on the railroad company by law and hence the case has no application to the question here involved.

The case of, In re, Morris Avenue bridge, 174 N. Y. Sup. 682, has no application to the question here involved because the liability of the railroad company in that case arose out of a statutory duty imposed upon the railroad company.

The case of Baggott vs. S. Ry. Co., 300 Fed. 337, relied on by Petitioner has been criticised and expressly disapproved by the Court of Appeals of Missouri. In this case the railroad company was alone sued for flooding land during Federal Control by reason of a defective trestle previously constructed by the railroad company. The Railroad Administration was not a party to the suit and its liability was not passed upon and the court in the opinion said that its liability could be passed upon in a suit for which ample provision had been made.

The principle that the creator of a nuisance is liable for damages resulting therefrom, and that the successor in title is not liable in the absence of notice to abate, was recognized by the court, but were held not applicable in this case because the defendant's prop-

erty had been taken away from it by a power in the nature of eminent domain. The court further held that the Government, in taking charge of the railroads and operating them during Federal Control was not in the situation of the ordinary grantee under a deed with warranty of title or a lessee under a lease. The court was of opinion that the defendant on account of being deprived of all power over its property and of the persons in control of it should not be liable for damages resulting from a nuisance during Federal Control although the nuisance was created by it prior to Federal Control. The doctrine of this case is especially applicable to the situation in the case at bar, even though Petitioner's liability could be placed on the ground that it stood in the position of the creator of the nuisance, because Petitioner is not shown prior to Federal Control to have had any knowledge of the harmful nature of the alleged nuisance or that Respondent had not voluntarily submitted to the alleged nuisance.

It is respectfully submitted that the errors assigned to the judgment of the Circuit Court of Wyoming County, West Virginia, should be sustained and that said judgment should be reversed by this court.

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